No. 9294.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

LUMBERMEN'S MUTUAL CASUALTY COMPANY, a corporation,

Appellant,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN, a minor and LORAINE JOHNSON,

Appellees.

APPELLANT'S REPLY BRIEF.

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Preface.

Appellant deems it unnecessary to make a detailed reply to the general statements of law found on pages 3 to 5, inclusive, of appellees' brief describing the general powers of an appellate tribunal upon review. Those rules are true provided, of course, there exists a real conflict in the evidence and there is substantial evidence to support the view adopted below.

An appellate tribunal is not bound by the findings below if the conflict is merely fanciful or unreal.

In *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, the rule was enumerated thus (p. 578):

> " * * * The rule that the finding of a jury on an issue of fact will not be disturbed where there is a conflict of evidence as to such fact applies only to cases where there is a real and not a mere pretense of conflict—where, as bearing on the issue, there is some body and substance to the asserted conflicting evidence. A finding against the great weight and preponderance of the evidence can be maintained on the doctrine of 'conflict' only where the alleged conflict rests upon evidence, either direct or circumstantial, which so materially contradicts the testimony on the other side, or is so radically inconsistent with it, as to leave room in a fair and reasonable mind to find the fact either way. This feature of the rule upon the 'conflict' of evidence has been heretofore declared by this court. In Smith v. Belshaw, 89 Cal. 427 (26 Pac. 834), the court said: 'While we will not disturb the verdict of a jury where the evidence is conflicting upon substantial matters, yet in all cases the verdict must have some meritorious support from the evidence or be set aside and disregarded.' In Hedge v. Williams, 131 Cal. 459 (82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106), the court said: 'Upon the part of respondent it is insisted that the verdict of the jury is conclusive as to the capacity in which Fountain was acting in repairing the tank. This contention can only be sound if there was a *substantial conflict of the evidence.* (The italics are ours.) In Driscoll v. Cable Ry. Co., 97 Cal. 553 (33 Am. St. Rep. 203, 32 Pac. 591), it is said: 'The rule is well established that this court will not disturb a verdict where there is a conflict of evidence on material points, and when there is evidence to support the verdict; but such conflict and such evidence must be real and substantial.' * * *"

And, in *Thoreau v. Industrial Acc. Comm.*, 120 Cal. App. 67, at page 73:

> "It is of course conceded that reviewing courts may not invade the field of the fact-finding body, and that under well-settled rules where a conflict of evidence exists the findings of the triers of the facts are conclusive; but it is equally well settled that the application of the foregoing doctrine is limited to cases where the conflict is substantial and real, and not fanciful or fictitious. (Burns v. Faget Engineering Co., 53 Cal. App. 762 (200 Pac. 818)), nor a mere pretense (Houghton v. Loma Prieta Lumber Company, 152 Cal. 574 (93 Pac. 377).)

Likewise, in *Christopher v. City of Los Angeles*, 13 Cal. App. (2d) 118, the court stated (p. 120):

> "No rule is so often repeated in the decisions of our appellate courts as the one that 'reviewing courts may not invade the field of the fact-finding body; and, consequently, where a conflict of evidence exists the findings of the trier of the facts are conclusive,' *but such conflict must be substantial and real, not mere conclusions, and must show a positive, direct evidence of a fact.* (Gamberg v. Industrial Acc. Com., 138 Cal. App. 424, at page 427 (32 Pac. (2d) 413).)" (Italics ours.)

It was demonstrated in appellant's opening brief that the controversy at bar was simply a situation whereby the appellees, in return for an agreement of indemnity, promised, in effect, that no requirement for indemnity

would exist if a loss occurred when the automobile involved in the agreement of indemnity was being driven by any person in violation of any state law as to age applicable to such person.

Added to this it was also demonstrated that a loss occurred and that such loss was primarily set in motion by the act of driving by a person in violation of a state law as to age applicable to such person, viz., an unlicensed minor.

It was likewise shown that where the primary cause of the loss is set in motion by an unlicensed minor the fact that there was an intervention by an adult does not change the prohibited use. For, as the Supreme Court held in its opinion in *State Farm Mutual Auto Insurance Co.*, 303 U. S. 485, 82 L. Ed. 970:

> "If, as found, the automobile was being jointly operated by the wife and the girl the risk was not within the policy. The latter was forbidden by law to operate or drive jointly or singly. If the wife was in control the statute forbade her to permit driving by the girl. *In any view* when the collision occurred the car was being driven or operated in violation of the statutes." (Italics ours.)

To combat the foregoing, the appellees contend that it makes no difference if the primary cause was the act of the unlicensed minor if at the precise time of the accident, viz., the time when the pedestrian in question was hit, the automobile was being steered by an adult person. (See App. Br. p. 14.)

Based on this premise appellees say the *State Farm* case, *supra*, is not controlling because:

1. There is no allegation of joint operation in the case at bar; and

2. Their case is supported by the decisions in *O'Connell v. New Jersey Fidelity and Plate Glass Co.* and *Williams v. Nelson*, both of which are cited at pages 16 and 17 of appellees' brief and which appellees assert should be followed by your Honorable Court.

Our reply, therefore, will be confined to the two points as indicated.

No specific reply is necessary to the lengthy excerpts from the trial judge's memorandum opinion as appearing in appellees' brief. This opinion was covered in our opening brief and to reply to the excerpts will merely be repetitious.

I.

Joint Operation.

It is noted that no constructive argument is made in support of this phase by appellees. The naked assertion is made, coupled with a quotation from the trial judge's memorandum opinion.

The point is far-fetched in even the mind of counsel for appellees.

As a matter of fact, the entire point is based upon the assumption that the complaint drafted by appellant alleges specifically *sole* operation by Grace Vaughn.

This is not true.

The complaint does allege:

> "that at the time of said accident the automobile described in said policy of insurance was being driven and operated by the defendant Grace Vaughn, a minor;" [R. 5.]

and the proof does affirmatively show that Grace Vaughn did activate and had activated some of the driving devices. (See Op. Br. p. 18.)

From this premise appellant has shown that, since Grace Vaughn was driving the automobile in part, such conduct is still within the exclusionary provisions of the contract of insurance.

This proof compelled the trial court to follow the decision of the *State Farm* case, *supra*, for, as there held, under either view, sole or joint operation, the insurance

carrier should not be held. It was also shown that, in addition to the proof as just explained, the condition of pleadings and the applicable rules (Op. Br. pp. 29 and 30) did not justify or furnish a legal basis for denial of the relief sought by appellant.

Appellees misconstrue appellant's position and attempt to cloud the issues. Appellant is not urging a new point on appeal. It is simply saying that, no matter which view is taken of the evidence below, the idea of operation and driving by Grace Vaughn is present, whether you look at such evidence as establishing sole driving by Grace Vaughn (per written statements of Clark) or looking at such evidence from the standpoint of Grace Vaughn doing some of the driving and being assisted by Clark.

Grace Vaughn's position behind the wheel was a part of the driving, since she had participated in some of the movements to retard the automobile and disconnect the motive power by depressing the clutch. These facts cannot be denied and must be included within any view taken of the evidence.

In this connection it is noted that appellees italicize that portion of the trial court's memorandum opinion wherein the position of Grace Vaughn is likened to a child being held in the lap. (See App. Br. p. 12.)

There is no factual parallel in the case at bar to such a situation for the very obvious reason that a child in the lap is at no time in a position to activate the driving and motor devices.

This example is far afield from the present case.

In the case at bar the minor, having available all of the driving and motor devices, starts a chain of events which produce an accident and this chain of events is put in motion not because of the minor's position in the car (as might be in the case of a child in a lap), *but* because of her inexperience in driving and activating the driving and motor devices.

Such discussion suggests another reason why the decision below is erroneous and that is it allows the construction of the exclusionary clause in question to depend upon what physical position the unlicensed driver may assume under the peril of an impending accident and not upon the prime reason for the existence of such exclusionary clause in the contract of insurance, viz., the prevention of incompetent drivers from using the automobile.

II.

The Cases of O'Connell v. New Jersey Fidelity and Plate Glass Co. and Williams v. Nelson, Relied on by Appellees.

An analysis of these cases show that the decisions there reached are based upon the premise that if the evidence shows that the dominating factor in the operation of the automobile was the act of the adult in driving the automobile, then the policy covered the accident and the carrier was liable.

They both involve cases where unlicensed minors were driving and the control of the automobile wrested from the unlicensed minor.

In the *O'Connell* case, *supra,* the facts were that the assured's granddaughter, while driving, was traversing a bridge and had turned to the left to miss several workmen located in the path of the automobile. As she did this the assured grabbed the steering wheel and turned the automobile back toward the right and into said workmen. As the majority opinion recites (193 N. Y. Supp. p. 913):

> "* * * the car was not going toward the men subsequently injured until the grandfather (assured) took control of the car and purposely changed its course."

In the *Williams* case, *supra,* the son of assured was driving and the assured told his son to get out from behind the steering wheel and he took charge of the auto-

mobile. The son "shrunk" back in the seat. The opinion in that case recites (117 N. E. 191):

> "The dominating mind in control of the operation of the automobile and regulating its movement at the moment of impact with the plaintiff was that of the father and not the son. * * * His initial choice was to drive rather than to stop or pursue some other line of action."

It is submitted that the premise of dominating control as suggested in the cited cases has been rejected by the Supreme Court of the United States in the *State Farm Mutual* case, *supra,* for were it not so there would be no occasion for that court to say:

> "In any view (joint or single operation) the car was being driven or operated in violation of the statutes (as to age)." (Parenthetical matter ours.)

The rule now is that where an automobile is being operated by an unlicensed minor and such driving is prohibited by an express clause in an insurance contract, it makes no difference as between the insurance carrier and the assured when construing the contract, what degree of control is asserted by the minor, for the court will always adopt a reasonable construction of the contract and if the minor operated the automobile to any extent it still is operating as that phrase was intended to be construed in the contract.

To be sure, this is the only common-sense view. These contracts cannot be emasculated by the mere whim or caprice of the assured. The provision is valid and no sound reason exists why an assured should be permitted, by the simple process of touching the steering wheel or

reaching for the emergency brake, to render nugatory express provisions in the contract.

The present action was brought for the purpose of enforcing a contractual provision. Such provision is unambiguous and affords no occasion to adopt a strict construction against its enforcement. In this connection it is interesting to note that of the two views adopted in the *O'Connell* case the minority opinion is more consistent with logic and a practical interpretation of the dispute. Since it expresses with remarkable clarity the view appellant is urging and since it explains the principle underlying the decision in the *State Farm Mutual* case, appellant takes the liberty of closing discussion with a quotation therefrom:

> "HINMAN, J. (dissenting) I take a little different view of this case. It is a matter of enforcement of a contract. We are dealing with an exception from the risk insured against. If the facts do not come within the exception, the defendant is liable for the judgment, notwithstanding the bankruptcy of the insured. Insurance Law, Sec. 109. If the facts do come within the exception, there was no coverage, and the bankruptcy of the insured has nothing to do with the case.
>
> A question as to whether the burden was upon the plaintiff to negative the exception, or whether it was upon the defendant to prove that the facts came within that exception, has been raised. It is not necessary to decide that question because, taking the testimony most favorable to the plaintiff, the situation which existed at the time of the accident came within the exception from the risk insured against. The fair interpretation of the provision of the policy

in question is that the policy did not cover any accident which was proximately caused by the automobile being driven by a person under the age of 16 years. If the facts show that that was the situation involved here, the plaintiff cannot recover. The driving of a car requires more than guiding its course on the highway. It must be deemed to include the control of the motive power and the brakes. To control these, to be able to regulate the amount of power, to be able to connect and disconnect such power instantaneously, and to be able to retard or stop the car in any emergency by the application of brakes, is just as much a part of driving the car, in any fair acceptance of the term, as is the holding of the wheel.

In my judgment, the control of the former is more essential to the avoidance of accident than the latter. The purpose and the natural meaning of the provision was to eliminate insurance against accident that might arise from the negligent management of any or all of these instruments which are utilized in the driving of a car. How can we say that the grandfather was driving this car? He was only in control of the direction which it took in its progress on the highway, and only imperfectly in the control of the wheel, because, obviously, his seat at the right of the wheel, instead of in back of it, was a disadvantageous one. He was not in control of the foot throttle, which regulated the flow of gas. He was not in control of the clutch, which disconnected the engine from the driving shaft. He was not in control of the service brake, which is the powerful brake of a car. His position was disadvantageous to control even the hand brake and at the same time to guide the wheel. The most that can be said is that the driving of the car was divided between the grand-

father and his 14-year-old granddaughter, for the reason that she released her hold on the wheel. Can a person be deemed any the less the driver of a car, within the meaning of the provision of the policy, by simply releasing the wheel to another? I am inclined to take the position that she cannot. I believe that comes within the risk that was not intended to be covered. The very thing which happened here is the thing which naturally would flow from permitting a child of that age to sit in the driver's seat. In any emergency, an adult at her side would naturally grasp the wheel and, not being in a position in such an emergency to exercise the best judgment, or to execute it from lack of ability to control all of the mechanism of the car, frequent accidents are likely to arise, which would not arise if a person of such age had not been permitted to occupy the driver's seat.

I think it is too narrow a construction of the language used to hold that the person managing the wheel is driving the car. The proper interpretation of the clause in question is that the policy does not cover an accident which has been proximately caused by the driving of a car by a person under the age of 16 years. It seems to me that the proximate cause of this accident was the driving of the car by a girl of 14 years, and that the act of the grandfather must be considered as an act set in operation by the primary cause, namely, having permitted a girl of those years to drive the car. His act was merely a continuation of the original act, and the accident was the probable consequence of having permitted this girl to drive the car, within the authority of Lowery v. Manhattan R. R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12, and Pollett v. Long, 56 N. Y. 200.

I favor a reversal and a dismissal of the complaint.

Van Kirk, J., concurs."

Conclusion.

The equities in this case favor a reversal of the judgment reached below. In all fairness to the appellant and other insurance carriers in the same situation, they are entitled to provide for such contingencies as is consistent with the premium charged. If appellees want to teach others to drive they can get additional coverage to cover such an event. Appellees should not be permitted to violate the express provisions of a contract by permitting an incompetent person to drive and then hide their contract violation behind the extremely technical view of the entire accident, viz., the contract was not violated because the minor did not have her hands on the steering wheel at the precise second of impact. This cannot be so.

It is earnestly urged that the judgment below be reversed.

Respectfully submitted,

C. F. Jorz,

Attorney for Appellant.